ASPECTS OF CROSS-BORDER ENFORCEMENT IN IRISH FAMILY LAW

Paper by Gerry Durcan SC and Sarah Fennell BL1 Wednesday 14th July 2010


Statutory Instrument No. 52/2002 – European Communities (Civil and Commercial Judgment) Regulations, 2002 was enacted for the purpose of giving full effect to Regulation 44/2001 (Brussels I).


The Scope of the Regulations

In respect of family law matters, Article 1(2)(a) of Regulation 44/20014 applies to maintenance and provides that it shall not apply to the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession. Regulation 2201/2003

1 See further the PowerPoint presentation by Gerry Durcan SC.
2 The contents of this Paper are not intended to form legal advice or opinion. The authors have endeavoured to ensure the accuracy of the contents. The authors do not accept liability for any errors or omissions. This Paper does not purport to cover the entire range of European Community legal instruments applicable to Irish family law. For some other examples, see Council Regulation 805/2004 (S.I. 648/2005 European Communities (European Enforcement Order/ Regulations) 2005 and Council Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation on matters relating to maintenance obligations. This latter Regulation is to apply from 18th June 2011. For more information, see http://europa.eu
4 The Lugano Convention on Jurisdiction and Judgments in Civil and Commercial Matters 1988 extended Regulation 44/2001 to the members of the European Free Trade Association. A new Lugano Convention has been passed since and entered into force in January 2010.
covers divorce, separation, legal annulment and parental responsibility and does not apply to the establishment or contesting of a parent child relationship or maintenance obligations in respect of a child.5

**Jurisdiction**

**Regulation 44/2001 and Maintenance**

In summary, the jurisdictional rules in regard to claims for ancillary orders making proper provision for a spouse are to be found in Articles 2, 4 and 5(2). Such orders making provision for a spouse are considered to be orders in relation to maintenance and therefore come within the Brussels I Regulation.

Article 2(1) addresses jurisdiction by providing:

“Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”

Article 5(2) then goes on to provide a special jurisdictional basis in respect of maintenance claims by providing that a person domiciled in a Member State may, in another Member State, be sued:

[I]n matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.

Article 59(1) provides:

In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law.

The relevant internal law is the European Communities (Civil and Commercial Judgment) Regulations 2002 which sets out the test of domicile for the purpose of the Regulation in Article 11 as follows:

(1) For the purposes of the Brussels I Regulation and these Regulations –

(a) an individual is domiciled in the State or another state (not being a member state) only if he or she is ordinarily resident in the State or that other state,

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5 Article 1(3).
(b) an individual is domiciled in a place in the State only if he or she is domiciled in the State and is ordinarily resident or carries on any profession, business or occupation in that place, and

(c) a trust is domiciled in the State only if the law is the system of law with which the trust has its closest and most real connection.

It would appear that “domicile” has a special meaning for the purpose of the Brussels I Regulation. A relevant authority is *Deutsche Bank A.G. v. Murtagh* 6 in which Costello J. stated:

Section 13 is quite clear – in order to determine for the purposes of the Convention of 1968 and the Act of 1988 whether an individual is domiciled in the State, the court must apply the provisions of the Fifth Schedule to the Act. This means that the traditional common law principles relating to the concept of domicile are not to be applied; instead the court will consider whether the defendant is “ordinarily resident” in the State. If he is and if he is a national of a Contracting State then the court has jurisdiction in accordance with the Convention and the Act.

The jurisdictional basis for maintenance was addressed by the European Court of Justice in *Farrell v. Long*. 7 According to the Court: 8

Article 5 introduces a series of derogations from the rule laid down in the first paragraph of Article 2, which confers jurisdiction on the courts of the Contracting State where the defendant is domiciled. Each of the derogations from that rule provided for by Article 5 pursues a specific objective.

In particular the derogation provided for in Article 5(2) is intended to offer the maintenance applicant, who is regarded as the weaker party in such proceedings, an alternative basis of jurisdiction. In adopting that approach, the drafters of the Conventions considered that that specific objective had to prevail over the objective of the rule contained in the first paragraph of Article 2, which is to protect the defendant as the party who, being the person sued, is generally in a weaker position.

It is worth noting in respect of *Farrell v. Long* that the concept of “maintenance creditor” includes those whose maintenance entitlement has not yet been decided.

Maintenance is not defined in the Regulation but has been addressed by the European Court of Justice in *Van den Boogaard v. Laumen*. 9

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7 This was addressed within the Brussels Convention which was replaced with the Brussels I Regulation.
8 Paragraphs 18-19.
Owing precisely to the fact that on divorce an English court may, by the same decision, regulate both the matrimonial relationships of the parties and matters of maintenance, the court from which leave to enforce is sought must distinguish between those aspects of the decision which relate to rights in property arising out of a matrimonial relationship and those which relate to maintenance, having regard in each particular case to the specific aim of the decision rendered.

It should be possible to deduce that aim from the reasoning of the decision in question. If this shows that a provision awarded is designed to enable one spouse to provide for himself or herself or of the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance. On the other hand, where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship and will not therefore be enforceable under the Brussels Convention. A decision which does both these things may, in accordance with Article 42 of the Brussels Convention, be enforced in part if it clearly shows the aims to which the different parts of the judicial provision correspond.

It makes no different in this regard that payment of maintenance is provided for in the form of a lump sum. This form of payment may also be in the nature of maintenance where the capital sum set is designed to ensure a predetermined level of income.

Consequently, the answer to be given must be that a decision rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership in certain property by one party to his or her former spouses must be regarded as relating to maintenance and therefore as falling within the scope of the Brussels Convention if its purpose is to ensure the former spouse’s maintenance. The fact that in its decision the court of origin disregarded a marriage contract is of no account in this regard.

See Article 23 for prorogation of jurisdiction which may raise interesting questions in this jurisdiction in terms of pre-nuptial agreements.

**Regulation 2201/2003 and Divorce, Legal Separation and Annulment**

Article 3 on general jurisdiction provides as follows:

"1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

(a) In whose territory: -

- the spouses are habitually resident, or

- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question, or in the case of the United Kingdom and Ireland, has his or her ‘domicile’ there;

(b) of the nationality of both spouse or in the case of Ireland or the United Kingdom of both spouses."

There is also a residual jurisdiction provision in Article 7 of the Regulation. Article 7(2) provides:

‘As against a respondent who is not habitually resident and is not either a national of a Member State, or in the case of the UK and Ireland, does not have his domicile [there], any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.’

The relevant domestic statutory provision in regard to jurisdiction is section 31(4) of the Judicial Separation and Family Law Reform Act 1989 Act which in paragraph 3 provides for jurisdiction to be exercised

‘where either of the spouses is domiciled in the State on the date of the application commencing proceedings or is ordinarily resident in the State throughout the period of one year ending on that date.’

Habitual Residence

The concept of habitual residence is central to six of the seven jurisdictional grounds listed in Article 3 of Brussels IIbis. Brussels IIbis does not provide a definition of the concept of habitual residence. Habitual residence is also a basis for jurisdiction under Article 5(2) of Regulation 44/2001.
The English case of *Marinos v. Marinos*\(^{10}\) is of relevance as one of the first cases in which the concepts of habitual residence and residence under Article 3 of the Regulation have been defined. Munby J. adopted the meaning given to the phrase ‘habitually resident’ in Article 3(1) throughout the decisions of the European Court of Justice, as encapsulated in the *Explanatory Report* on the contemplated Convention prior to the Regulation itself coming into force, prepared by Dr. Borrás where it was said at para. 32: "the place where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence." As regards calculating habitual residence, Munby J. explained:

"In common with counsel I do not think that the determination of the wife’s habitual residence, or of her residence, requires resolution of this dispute, let alone any precise calculation of the relevant figures....the ECJ case-law shows that habitual residence involves not a purely quantitative calculation of the time spent by a person in a particular place but rather a qualitative evaluation of all the facts pertaining to an individual’s links with a place."

The judgment of Munby J. in *Marinos v. Marinos* had been cited with approval by Sheehan J. in *O’K v. A*\(^{11}\) in which the learned High Court judge held the Applicant’s habitual residence as Ireland and accepted her assertion that the parties intended to settle and raise the children in Ireland. Sheehan J. went on to rely on a variety facts in support of Ireland as the jurisdiction of habitual residence which included that the parties had purchased a substantial home in Ireland in 2004, that the Respondent instituted proceedings under the Guardianship of Infants Act, 1964, that access arrangements to the children occurred in Ireland and that the Respondent is a person of independent means not in employment outside of Ireland.\(^{12}\) Relying on these facts, Sheehan J. concluded:

*I hold that the above facts...far outweigh any considerations to b given to the respondent’s assertion that the primary residence of the family is in the United States of America, that both he and the applicant and the children are citizens of the United States of America, that the married in the United States of America, entered into a pre-nuptial contract there, that most of the assets are in the United States of America and that he pays his taxes in Florida.*

**Domicile**

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\(^{12}\) See para. 5.5. of the judgment.
A recent indicator of the approach taken in assessing whether a person had taken up a domicile in a particular jurisdiction is to be found in the Supreme Court decision in *P.K. v. T.K.*\(^\text{13}\) The Court made clear that the issue of whether a party abandoned a domicile of choice is one of fact for the trial judge. The Supreme Court endorsed the applicable test as being whether the applicant had unmistakably shown by his/her conduct, viewed against the background of the surrounding circumstances that he or she had formed the settled purpose of residing indefinitely in another jurisdiction. Although the date of the divorce decree was accepted in principle as the relevant date, retrospective light might be cast on the party’s intentions on that date by later actions. The Court also held that courts will not automatically assume a change of domicile where the move is explained by some external and intrinsically temporary factor and pointed out that a person may take up permanent employment in another country without changing domicile. The common expectation is that he will return to his place of origin.

*Regulation 2201/2003 and Parental Responsibility*

As regards custody and/or access to the children, the jurisdictional rules in regard to orders in respect of children are to be found in Articles 8 and 12 of the Brussels\(\text{IIbis}\). Article 8 provides that:

> ‘[T]he Courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the Court is seized.’

There is a further basis of jurisdiction in respect of parental responsibility set out in Article 12(3) of Regulation 2201/2003 as follows:

The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where

(a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings as the time the court is seised and is in the best interests of the child.

\(^{13}\) *P.K. v. T.K.*, (Unreported, 5\(^\text{th}\) March 2002).
Clearly, Article 12(3) on the prorogation of jurisdiction requires certain conditions to be met before it confers jurisdiction. There is a recent English authority on Article 12(3). In *I (A Child)*\(^{14}\) the Supreme Court held that Brussels II\(bis\) applies to non-EU resident children.

**First Seised**

Article 30 of Regulation 44/2001 provides that a court shall be deemed to be seised where:

1. at the time when the documents instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or

2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

Article 16 of Regulation 2201/2003 provides:

1. A court shall be deemed to be seised:

   (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent;

   or

   (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant had not subsequently failed to take the steps he was required to take to have the document lodged with the court.

The question of which court is first seised in the context of Brussels II\(bis\) was addressed in this jurisdiction by O'Higgins J. in *Y.N.R. v. M.N.*\(^{15}\) The applicant and respondent were both French citizens who had entered into a marriage contract in France. In 1998, the parties came to Ireland and established their residence here. In 2002, the respondent returned to France and in November 2002 filed for divorce in France. In December 2003, the applicant instituted family proceedings in the High Court in this jurisdiction. The applicant applied to the French court which held that it has jurisdiction to hear the proceedings under the provisions of Brussels II\(bis\).

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\(^{15}\) [2005] 4 I.R. 552.
The Applicant had counterclaimed in the French proceedings. O'Higgins J. held that the Applicant was precluded from making her case given that she counterclaimed for divorce in France while maintaining that the granting of that petition was impermissible because the seat of the parties marriage was in Ireland. However, the learned High Court judge considered the question of jurisdiction not on the merits but in deference to legal arguments and in the event of a different conclusion being arrived at elsewhere. The following elements of the judgment are particularly to be noted.

As regards choice of jurisdiction, the Court explained:

"The Brussels II Regulation is part of Irish law. It specifically allows for a choice of jurisdiction in some circumstances, including those which are applicable in the case of the respondent. Under the Regulation, he was entitled to bring proceedings in the jurisdiction of the French courts. By so doing, there were indeed consequences for the applicant which may well be different than those following a judicial separation under Irish law. However, there is nothing in law to support the contention that because the seat of the marriage was in Ireland, the respondent was precluded from exercising the options specifically given to him under the Brussels II Regulation. A choice of jurisdiction was available to him and he was legally entitled to exercise that choice to seek divorce in France."

The Applicant had argued that a question should be referred to the European Court of Justice as to when the French court was first seised. According to O'Higgins J.:

"This was a decision of a French court deciding when proceedings had commenced under French law. This finding was unappeased. No issue of Community law arises to be determined by this or any other court."

Finally, in respect of the question of intervention in the French legal system, it was provided that:

"It would be unwarranted and irresponsible of this court to act on the assumption that the French courts will act other than in any way permitted by the relevant legislation and it is clear that the Irish courts have no role in the supervision of the French courts in doing their legitimate business."

There are also useful English authorities on this question.

In Wermuth v. Wermuth¹⁶ Bracewell J. was asked to consider, inter alia, Article 11 of Brussels II. Article 11 of this Regulation was in similar terms to Article 16 of Brussels IIbis (see above). The question before the Court was which court was first seised, the German or English court.

The German court had decided that the conditions laid down in Article 11(4)(a) had been met. Bracewell J. held:

In coming to those conclusions, the judge in Germany was applying German law to findings of fact which the judge had found established on the evidence. The judge interpreted the meaning of Article 11.4(a). It is a matter, in my judgment for the German court to decide the issues on the evidence and not for any expert witness. The burden of proof is for the German court to determine, as is any factual or legal argument. It is true that when a matter is to be decide in this jurisdiction English rules of law and procedure will be used to interpret a Regulation. Likewise, when a German court is deciding an issue, their rules of law and procedure will govern the decision-making.

In Chorley v. Chorley\(^\text{17}\) the husband issued a requête in France, which initiated the process whereby a French divorce could be obtained. The wife issues divorce proceedings in England almost a year after the husband’s requête in France. The husband challenged the jurisdiction of the English court arguing that the French court was the court first seised. Thorpe J. granted a stay on the wife’s divorce petition. There are number of aspects to this judgment worth noting. Firstly, given that the French courts were first seised, the learned judge adopted the approach that deferring the question of jurisdiction to the French courts in which a date was set three months forward “...had the huge advantage of avoiding the risk of conflicting decisions in the neighbouring jurisdictions on a pure issue of characterisation of French process.” Secondly, Thorpe J. held that if Brussels II “…is to achieve the objectives that all Member States intended...then manifestly it is essential that the filing of the requête in France be held to be the first manifest step.” Finally, Thorpe J observed that “...this is most evidently the sort of dilemma that the creation of the European Judicial Network (EJN) is intended to resolve....The creation of the EJN presents an opportunity to ensure direct judicial communication to enhance the prospect of judicial collaboration across frontiers.”


**Lis Pendens**

See the decision of the European Court of Justice in *Overseas Union Insurance Ltd*,\(^\text{18}\) and in particular paras. 19, 23, 24 and 25.

Article 27 of Regulation 44/2001 provides:

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1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 19 of Regulation 2201/2003 provides:

1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.

In the recent Supreme Court decision of D.T. v. F.L. 19 Fennelly J discussed the objectives of avoiding conflicting judgments as follows:

..Though decided in the context of the Brussels Convention, it may be assumed to be equally applicable to the Brussels Regulations. The underlying objective of the Convention is to avoid conflicts between judgments delivered in the courts of the member states between the same parties and touching on the same subject matter. It follows that the courts of the member states must act so as to prevent conflicting judgments from arising...

Provisional Including Protective Measures

Article 31 of Regulation 44/2001 provides:

Application may be made to the courts of a member state for such provisional, including protective measures as may be available under the law of that State, even if, under this

Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

Article 20 of Regulation 2201/2003 provides:

1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.

2. The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.

See Reichert v. Dresdner Bank AG\textsuperscript{20} and Wermuth v. Wermuth.\textsuperscript{21}

**Forum Non Conveniens**

In Owusu v. Jackson\textsuperscript{22} the European Court of Justice addressed the compatibility of forum non conveniens doctrine with the Brussels Convention. It held that the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 on the ground that a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of nor other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State. The Court was also asked whether the application of the doctrine is ruled out in all circumstances or only in certain circumstances. The Court did not consider it necessary on the facts before it to address this and decided not to reply to it.

Sheehan J. held in O’K v. A,\textsuperscript{23} in the context of Irish judicial separation proceedings and United States divorce proceedings that:

“...the doctrine of forum non conveniens, or forum conveniens as it is also called, does not survive Brussels II bis.”

Recently in the English case of JKN v. JCN\textsuperscript{24} the High Court held that Owusu v. Jackson was not analogous to the English divorce proceedings before it. A stay was granted in favour of New York on the ground of forum non conveniens. The High Court judge held that the Owusu analogy did not apply given that the language of Brussels IIbis differed significantly from Brussels I.

\textsuperscript{21} Above, n. 16.
\textsuperscript{22} Case C-281/02 [2005] ECR I-1383.
\textsuperscript{23} [2008] IEHC 243.
\textsuperscript{24} [2010] EWHC 843 (Fam).
Recognition and Enforcement

See Articles 33 of Regulation 44/2001 (no special procedure required), 34 (grounds for non-recognition), 36 (no review of foreign judgment as to substance) and Article 39 (para 1 and Annex 2 for courts or competent authority in each Member State to which the application must be made) and 40 (procedure).

See Articles 21 of Regulation 2201/2003 (no special procedure required), 22 and 23 (grounds for non-recognition), 24 (no review of foreign judgment as to substance), 28 (enforceable judgments) and 30 (procedure).

Procedure

Paragraph 4 of S.I. No. 52/2002 provides *inter alia*:

(1) An application under the Brussels I Regulation for the recognition or enforcement in the State of a judgment shall be made to the Master of the High Court.

(2) The Master shall determine the application by order in accordance with the Brussels I Regulation.

(3) If the application is for the enforcement of a judgment, the Master shall declare the judgment enforceable immediately on completion of the formalities provided for in Article 53 without any review under Articles 34 and 35 and shall make an enforcement order in relation to the judgment.

(4) An order under paragraph (2) may provide for the recognition or enforcement of only part of the judgment concerned.

Paragraph 4 of S.I. No. 112/2005 provides:

An application –

(a) under Section 1 of Chapter III for a decision that a judgment be or not be recognised,

or

(b) under Section 2 of Chapter III for a declaration of enforceability of a judgment,

shall be made to the High Court.

The Irish Rules governing applications for recognition and enforcement of judgments are set out in Order 42A of the Rules of the Superior Courts.